Bank Kerjasama Rakyat Bhd & Ors v Haji Mat @ Mat Shah bin Haji Ahmad @ Sapuan

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1183 OF 2002
KANG HWEE GEE J
13 FEBRUARY 2007

Civil Procedure — Summary judgment — Application for — Under O 14A Rules of the High Court 1980 — Whether plaintiffs' case could be heard under O 14A Rules of the High Court 1980 notwithstanding dismissal of a previous application under O 14 Rules of the High Court

This was an application by the plaintiffs to have this case heard under O 14A of the Rules of the High Court 1980 ('RHC') on the grounds that the plaintiffs' claim for the repayment of money arising out of a settlement agreement entered into between the defendant and the plaintiffs could be properly disposed of in a summary manner under O 14A. The plaintiffs' claim arose from a judgment obtained by the plaintiffs in the High Court. The defendant did not pay the judgment sum. In consequence thereof, a settlement agreement was entered into between the parties as evidenced by several exchanges of letters. The defendant paid RM2.1m to the plaintiffs leaving a balance of RM1.7m unpaid. The plaintiffs are now claiming the balance sum. The plaintiff previously applied to enter final judgment under O 14 of the RHC which application had been dismissed by the senior assistant registrar and confirmed by the judge in chambers. Therefore, the O 14A of the RHC application was opposed by the defendant on the ground that inter alia the earlier application had been dismissed obviously because there were triable issues and not a suitable case to grant summary judgment. It followed therefore that the present application being another application for summary judgment would also contain triable issues and it should be dismissed.

Held, allowing plaintiffs' application:

(1) This was a fit and proper case to be disposed off under O 14A of the RHC notwithstanding that the plaintiffs had applied for and failed to obtain a summary judgment under O 14 of the RHC (see para 9).

(2) An application for summary judgment under O 14 of the RHC is different in nature from an application under O 14A of the RHC. Under O 14 the scope of the enquiry is restricted to discovering whether there is a triable issue on the plaintiffs' case, whereas under O 14A the scope of enquiry includes an examination of the affidavit evidence to discover whether the plaintiffs' claim ought to be granted in those cases where the court can justifiably dispense with oral evidence to arrive at a finding and decision (see para 10).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif-plaintif agar kes ini didengar di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa tuntutan plaintif-plaintif untuk bayaran balik wang yang timbul daripada perjanjian penyelesaian yang dimasuki antara defendan dan plaintif-plaintif dapat diselesaikan dengan betul secara terus di bawah A 14A. Tuntutan palitnif-plaintif timbul daripada penghakiman yang diperoleh oleh plaintif-plaintif di Mahkamah Tinggi. Defendan tidak membayar jumlah penghakiman. Berikutan itu, satu perjanjian penyelesaian telah dimasuki antara pihak-pihak seperti yang dibuktikan oleh beberapa surat-menyurat. Defendan telah membayar RM2.1j kepada plaintif-plaintif dengan meninggalkan baki RM1.7j tidak berbayar. Plaintif-plaitnif sekarang menuntut baki jumlah tersebut. Plaintif sebelum ini telah memohon penghakiman muktamad di abwah A 14 KMT di mana permohonan itu telah ditolak oleh penolong kanan pendaftar dan disahkan oleh hakim dalam kamar. Oleh itu, permohonan A 14A KMT ditentang oleh defendan atas alasan bahawa antara lain permohonan sebelumnya telah ditolak dengan nyata kerana terdapat isu-isu yang perlu dibicarakan dan bukan kes yang sesuai untuk membenarkan penghakiman terus. Berikutan itu permohonan ini yang merupakan satu lagi permohonan untuk penghakiman terus juga mengandungi isu-isu yang perlu dibicarakan dan patut ditolak.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Ini merupakan kes yang sesuai dan betul untuk diselesaikan di bawah A 14A KMT meskipun plaintif-plaintif telah memohon untuk dan gagal memperoleh penghakiman terus di bawah A 14 KMT (lihat perenggan 9).

(2) Satu permohonan untuk penghakiman terus di bawah A 14 KMT adalah berbeza sifatnya daripada satu permohonan di bawah A 14A KMT. Di bawah A 14 skop yang dipersoalkan adalah terhad untuk mengetahui sama ada terdapat isu-isu yang perlu dibicarakan ke atas kes palintif-plaintif, manakala di bawah A 14A skop yang dipersoalkan termasuklah satu pemeriksaan keterangan afidavit untuk mengetahui sama ada tuntutan plaintif-plaintif patut dibenarkan dalam kes-kes di mana mahkamah boleh dengan justifikasi menyelesaikannya melalui keterangan lisan untuk tiba kepada satu penemuan dan keputusan (lihat perenggan 10).]

Notes

For cases on application for summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6195–6236.

Cases referred to

BOC Group plc v Centeon LLC & Anor [1999] 63 Con LR 104 (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)

Korso Finance Establishment Anstalt v John Wedge (Transcript No 14/387) (unreported) (refd)

Legislation referred to

Limitation Act 1953 s 6
Rules of the High Court 1980 O 14, O 14A

KK Chan (Shook Lin & Bok) for the plaintiffs.
MY Phan (Wilson Wong & Tan) for the defendant.

Kang Hwee Gee J (delivering oral judgment ex tempore):

[1] This is an application by the plaintiffs to have this case heard under O 14A of the Rules of the High Court 1980 on the grounds that:

1 The plaintiffs' claim for the repayment of money arising out of a settlement agreement entered into between the defendant and the plaintiffs can be properly disposed of in a summary manner under O 14A.

2 The plaintiffs' claim arose from a judgment obtained by the plaintiffs in the High Court D1–23–336–88 which judgment order read as follows:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

SUIT NO D1–23–336–88

Between

1. Bank Kerjasama Rakyat Malaysia Berhad
2. Malayan Banking Berhad
3. The Malayan Finance Corporation Berhad
4. Kwong Yik Bank Berhad
5. United Malayan Banking Corporation Berhad
6. Rakyat First Merchant Bankers Berhad … Plaintiffs

And

1. Pembinaan Bandar Melaka Sdn Bhd
2. Haji Mat @ Mat Shah bin Ahmad @ Sapuan
3. Haji Abd Mutalib bin Datuk Seri Datuk Abdul Razak
4. Datuk Johari bin Yusof
5. Haji Anuarul Aini bin Mohd. Perai … Defendants

Dated the 28th day of September, 1988

JUDGMENT

The second, third, fourth and fifth defendants having entered appearance herein and the court having under O 14 ordered that judgment as hereinafter provided be entered for the plaintiffs against the second, third, fourth and fifth defendants and each of them.

IT IS THIS DAY ADJUDGED that:

1. the first plaintiff do recover against the second, third and fourth defendants and each of them:

   (a) the sum of $3,681,039.76 (Ringgit Three Million Six Hundred & Eighty One Thousand Thirty Nine and Sen Seventy Six only) under paragraph 9(a) of the amended statement of claim;

   (b) interest on the sum of $2,825,600 (Ringgit Two Million Eight Hundred & Twenty five Thousand and Six Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;

2. the second plaintiff do recover against the second, third, fourth and fifth defendants and each of them:

   (a) the sum of $2,760,013.16 (Ringgit Two Million Seven Hundred and Sixty Thousand Thirteen and Sen Sixteen only) under paragraph 9(b) of the Amended Statement of Claim;

   (b) interest on the sum of $2,119,200.00 (Ringgit Two Million One Hundred & Nineteen Thousand and Two Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;

3. the 3rd Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:

   (a) the sum of $2,775,404.18 (Ringgit Two Million Seven Hundred and Seventy Five Thousand Four Hundred and Four and Sen Eighteen only) under paragraph 9(c) of the Amended Statement of Claim;

   (b) interest on the sum of $2,119,200 (Ringgit Two Million One Hundred and Nineteen Thousand and Two Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realization;

4. the 4th Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:

   (a) the sum of $1,840,008.79 (Ringgit One Million Eight Hundred and Forty Thousand and Eight and Sen Seventy Nine only) under paragraph 9(d) of the Amended Statement of Claim;

   (b) interest on the sum of $1,412,800.00 (Ringgit One Million Four Hundred and Twelve Thousand and Eight Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realization;

5. the fifth plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:

   (a) the sum of $1,840,008.76 (Ringgit One Million Eight Hundred and Forty Thousand and Eight and Sen Seventy Six only) under paragraph 9(e) of the amended statement of claim;

(b) interest on the sum of $1,412,799.99 (Ringgit One Million four Hundred and Twelve Thousand Seven Hundred and Ninety Nine and Sen Ninety Nine only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20 August 1987 to the date of full payment or realisation;

6. the sixth plaintiff do recover against the second, third and fourh defendants and each of them:

(a) the sum of $878,688.41 (Ringgit Eight Hundred and Seventy Eight Thousand Six Hundred and Eighty Eight and Sen Forty One Only) under paragraph 9(f) of the amended statement of claim;

(b) interest on the sum of $706,400 (Ringgit Seven Hundred and Six Thousand and Four Hundred only) at the rate of 2.5% per annum above the sixth plaintiff's three months cost of funds and a penalty charge of 2% per annum with effect from 20 August 1987 to the date of full payment or realisation;

(c) the sum of $40,000 (Ringgit Forty Thousand only) under paragraph 12 of the amended statement of claim with interest thereon at the rate of 8% per annum from 8 February 1988 to the date of full payment or realisation.

AND IT IS ALSO ADJUDGED that the second, third, fourth and fifth defendants and each of them do pay to the Plaintiffs the costs of this application to be taxed by a proper officer of the Court.

Dated the 28th day of September, 1988.

Sgd.

Senior Assistant Registrar,

High Court, Kuala Lumpur.

This order is filed by Messrs Shook Lin & Bok, Solicitors for the plaintiffs herein and whose address for service is 21st Floor, Wisma HLA, Jalan Raja Chulan, 50200 Kuala Lumpur.

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3 The defendant did not pay the judgment sum. In consequence thereof, a settlement agreement was entered into between the parties as evidenced by several exchanges of letters as follows in chronological orders (exh 'AZA-11' encl 24)

(i) letter dated 15 December 1995;

(ii) letter dated 16 December 1995;

(iii) letter dated 20 December 1995;

(iv) letter dated 26 December 1995;

(v) letter dated 16 January 1996;

(vi) letter dated 19 January 1996;

(vii) letter dated 27 January 1996;

(viii) letter dated 13 February 1996;

(ix) letter dated 28 February 1996;

(x) letter dated 14 March 1996;

(xi) letter dated 15 March 1996;

(xii) letter dated 12 April 1996;

(xiii) letter dated 4 June 1996;

(xiv) letter dated 7 June 1996;

(xv) letter dated 11 December 1997;

(xvi) letter dated 2 January 1998;

(xvii) letter dated 5 January 1998;

(xviii) letter dated 15 January 1998;

(xix) letter dated 14 May 1998;

(xx) letter dated 8 December 1999.

4 The agreement that had been reached between the parties is in p 296 encl 24 exh 'AKZA-11' as confirmed by the defendant in paragraph 2 of its letter dated 15 March 1996.

5 Thereafter the defendant paid RM2.1m to the plaintiff leaving a balance of RM1.7m unpaid.

6 The plaintiff is claiming the balance sum.

[2] The application is opposed by the defendant on the following grounds:

1 The plaintiffs had previously applied to enter final judgment under O 14 of the Rules of the High Court 1980 and the application had been dismissed by the senior assistant registrar and confirmed by the judge in chambers Abdul Wahab bin Said Ahmad J.

2 The plaintiffs' application had been dismissed obviously because there are triable issues and not a suitable case to grant summary judgment. It follows therefore that the present application being another application for summary judgment would also contain triable issues.

3 That there may be triable issues had already been decided by Abdul Wahab bin Said Ahmad J.

4 The defendant has also failed to strike out the plaintiffs' claim thereby confirming that there are triable issues.

5 Abuse of process — having failed to obtain O 14.

6 This case is more suitable to be dealt with at a full hearing where witnesses may have to be called.

7 Under the statement of claim the plaintiffs are only claiming the balance sum of RM1.7m as an alternative trade.

REPLY BY ENCIK CHAN, COUNSEL FOR THE APPLICANT

[3] There is no authority to support the view that just because a party had failed in an O 14 application that he should not be allowed to apply under O 14A but there are cases in the English jurisdiction where a party had unsuccessfully proceeded under O 14 and subsequently applied under O 14A. See *BOC Group plc v Centeon LLC & Anor* [1999] 63 ConLR 104 per Lord Justice Evans at p 3 of 11 LexisNexis:

> The appeal is from Rix J in the Commercial Court (see p 104, ante). He held that cl 2.7 does not have that effect. He therefore refused the application for summary judgment under RSC O 14, and answered the question of construction in favour of the defendant, the purchaser, under O 14A. The sellers appeal. They are the BOC Group plc (BOC).

[4] Submits: This case illustrates that having dismissed the plaintiff's case under O 14 the learned English Justice Rix went on to decide the case under O 14A. The Court of Appeal upheld the procedure that he adopted.

[5] Submits: An O 14 is different from an O 14A. Under O 14 the court has to decide whether there is a triable issue that ought to go for trial whereas under O 14A the court makes an actual determination on any question of law or construction of any documents and makes a decision as to whether the action should be allowed or be dismissed. See *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 at p 19 where Mohd Noor Ahmad JCA adopts the procedure in the English case of *Korso Finance Establishment Anstalt v John Wedge* (unreported, 15 February 1994 (CA) Transcript No 14/387) as follows:

(1) An issue is 'a disputed point of fact or law relied on by way of claim or defence'.

(2) A question of construction is well capable of constituting an issue.

(3) If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

(4) Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something, that might run up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application (see *The Supreme Court Practice 1999* Vol 1 para 14A/2/5).

[6] Submits: The present case is a suitable candidate for O 14A as the matter in this particular case involves the construction of documents, the making of which are not in dispute.

[7] Submits: The present case involves the determination of whether the settlement agreement as evidenced by a series of correspondence between the parties tantamount to a valid agreement binding on the parties. This is a question of construction to be assessed from the series of documents. The other point that the court will have to decide is purely a question of law whether the period of limitation has set in under s 6 of the Limitation Act 1953 taking into consideration the respective dates to decide on the accrual and expiry of the course of action.

REPLY BY COUNSEL FOR THE DEFENDANT

[8] BOC Group can be distinguished on the procedure adopted. It would appear from the judgment of the Court of Appeal that both parties were agreeable to proceed on the O 14A procedure on the one issue that the court proceeded to hear and decide. Here the defendant objects to this application.

FINDINGS AND DECISION

[9] This is a fit and proper case to be disposed off under O 14A notwithstanding that the plaintiffs had applied for and failed to obtain a summary judgment under O 14.

[10] I accept the submission of counsel for the plaintiffs that an application for summary judgment under O 14 is different in nature from an application under O 14A. Whereas under O 14 the scope of the enquiry is restricted to discovering whether there is a triable issue on the plaintiffs' case, under O 14A the scope of enquiry includes an examination of the affidavit evidence to discover whether the plaintiffs' claim ought to be granted in those cases where the court can justifiably dispense with oral evidence to arrive at a finding and decision.

[11] Having heard the submission of parties and examined the pleading filed by the parties in this case, it is clear that the only issues that need to be examined and adjudicated upon is as follows:

(i) whether the series of letters between the plaintiffs and the defendant can lead to a concluded contract by which the defendant would be liable to pay the plaintiffs; and

(ii) whether the plaintiffs' claim would be barred by the s 6 of the Limitation Act 1953, the claim being a claim in contract.

[12] I would therefore grant an order in terms of this application and order that the parties prepare the following documents for the purpose of the proceeding under O 14A:

A (i) a statement of agreed facts based entirely on the pleadings;

(ii) a statement of the two issues to be tried;

(iii) all affidavits deemed necessary to support or to oppose the claim be filed.

(iv) all the above to be filed in within one month from today.

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[13] The application is to be heard on 10 April 2007.

Plaintiffs' application allowed.

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Reported by K Krishnan

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